

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,
Plaintiff,

v.

OMAR LIZARRAGA-CEDANO,
Defendant.

No. CR-04-15-FVS

ORDER DENYING MOTION TO
VACATE

THIS MATTER comes before the Court based upon the defendant's motion to vacate his sentence and resentence him. He is representing himself.

BACKGROUND

On March 31, 2005, the Court sentenced the defendant to a term of 372 months imprisonment based upon a jury's verdict that he committed the crimes of conspiracy to distribute a controlled substance, 21 U.S.C. § 846, and possession with intent to distribute a controlled substance. He appealed. One of his contentions was that his sentence was disproportionately long when compared to the sentences of his coconspirators. The Ninth Circuit rejected this contention and affirmed his conviction and sentence on July 26, 2006. On September 20, 2006, he filed a motion to vacate. 28 U.S.C. § 2255. He argued he had been denied constitutionally effective assistance of counsel at sentencing and on appeal. The Court denied his § 2255 motion, and the

1 Ninth Circuit affirmed. On August 16, 2010, he filed a "Petition for
2 Review of Sentence." He urges the Court to vacate his sentence and
3 resentence him.

4 **RULING**

5 The defendant argues the Court has authority to grant the relief
6 he seeks under either of two statutes. The first statute is 18 U.S.C.
7 § 3742. It permits a defendant to appeal a sentence. Section 3742 is
8 inapplicable because the defendant has appealed his sentence and his
9 sentence has been upheld. The other statute cited by the defendant is
10 18 U.S.C. § 3582(c). It prohibits a district court from modifying a
11 term of imprisonment unless:

12 (1) the Director of the U.S. Bureau of Prisons moves to
13 reduce the defendant's term of imprisonment; (2) a
14 modification otherwise is expressly permitted by statute, or
15 by Fed.R.Crim.P. 35; or (3) the defendant was sentenced
16 based on a guideline range that subsequently was reduced by
the U.S. Sentencing Commission, and a reduction is
consistent with the Commission's policy statements.

17 *United States v. Guerra*, No. 10-10049, 2010 WL 3155999, at *4 (11th
18 Cir. Aug. 10, 2010). None of the preceding contingencies exists.
19 Thus, § 3582(c) is inapplicable. The only statute which arguably
20 authorizes the Court to grant the relief that the defendant seeks is
21 28 U.S.C. § 2255. *Harrison v. Ollison*, 519 F.3d 952, 956, (9th
22 Cir.2008) ("Generally, motions to contest the legality of a sentence
23 must be filed under [28 U.S.C.] § 2255 in the sentencing court[.]'"
24 (quoting *Hernandez v. Campbell*, 204 F.3d 861, 864 (9th Cir.2000))).
25 However, the defendant has already sought, and been denied, relief
26 pursuant to § 2255. He would have to obtain permission from the Ninth

1 Circuit in order to file a "second or successive" § 2255 motion.
2 *United States v. Lopez*, 577 F.3d 1053, 1061 (9th Cir.2009). The Court
3 need not decide whether the defendant's "Petition for Review of
4 Sentence" is a "second or successive" § 2255 motion because he is not
5 seeking relief under that statute. It is enough to observe that he is
6 not entitled to relief under either of the statutes upon which he
7 relies. Thus, his "Petition for Review of Sentence" must be
8 dismissed.

9 **IT IS HEREBY ORDERED:**

10 1. The defendant's "Petition for Review of Sentence" (**Ct. Rec.**
11 **254**) is dismissed with prejudice.

12 2. The Court will not consider a motion for reconsideration.

13 3. The Court will not issue a Certificate of Appealability.

14 **IT IS SO ORDERED.** The District Court Executive is hereby
15 directed to enter this order and furnish copies to the defendant and
16 to counsel for the government.

17 **DATED** this 23rd day of August, 2010.

18 s/ Fred Van Sickle
19 Fred Van Sickle
20 Senior United States District Judge
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